

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF TEXAS
BEAUMONT DIVISION**

No. 1:99-cr-62

United States of America

v.

Keith Wayne Zeno

Defendant

**Report and Recommendation Re: Petition for Warrant
or Summons for Offender Under Supervision**

Pending is a “Petition for Warrant or Summons for Offender Under Supervision,” filed August 29, 2008, alleging that defendant violated conditions of supervised release. This matter is referred to the undersigned United States magistrate judge for review, hearing, and submission of a report with recommended findings of fact and conclusions of law. See United States v. Rodriguez, 23 F.3d 919, 920 n.1 (5th Cir. 1994); see also 18 U.S.C. § 3401(i) (2000); Local Rules for the Assignment of Duties to United States magistrate judge.

I. The Original Conviction and Sentence

Defendant was sentenced on September 23, 1999, before The Honorable Howell Cobb, U.S. District Judge of the Eastern District of Texas, after pleading guilty to the offense of Possession with Intent to Distribute Crack Cocaine, a Class B felony. This offense carried a statutory maximum imprisonment term of 40 years. The guideline imprisonment range, based on a total offense level of 23 and a criminal history category of IV, was 70 to 87 months. Defendant was subsequently sentenced to 87 months imprisonment followed by 5 years supervised release subject to the standard conditions of release, plus special conditions defendant shall not commit any offenses against a foreign state or nation; financial disclosure; drug aftercare; and a \$100 special assessment.

II. The Period of Supervision

On September 21, 2004, defendant completed his period of imprisonment and began service of the supervision term. Defendant's case was later reassigned to The Honorable Ron Clark, U.S. District Judge for the Eastern District of Texas, on February 27, 2006.

III. The Petition

United States Probation filed the pending First Amended Petition for Warrant or Summons for Offender Under Supervision on August 29, 2008. The petition alleges that defendant violated the following conditions of release:

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| Mandatory Condition: | Defendant shall not illegally possess a controlled substance. |
| Mandatory Condition: | Defendant shall not commit another federal, state, or local crime. |

Standard Condition: Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

Standard Condition: Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

Standard Condition: Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

Standard Condition: Defendant shall notify the probation officer ten days prior to any change in residence or employment.

As grounds, the petition alleges that defendant On July 15, 2008, defendant was located by the Port Arthur Police Department at a residence with another individual. Both were arrested for possession of crack cocaine. Further, defendant attempted to have Vanessa Davis alter his employment excuse to allow him to return to work at a later date. Finally, defendant never reported to his probation officer that he was off from work.

IV. Proceedings

On November 5, 2008, the undersigned United States Magistrate Judge convened a hearing pursuant to Rule 32.1, Federal Rules of Criminal Procedure, to hear evidence and argument on whether defendant violated conditions of supervised release. If so, the hearing would also consider the appropriate course of action.

At the revocation hearing, counsel for the government and the defendant announced an agreement as to a recommended disposition. Defendant would agree to plead “true” to the allegation that defendant associated with persons engaged in criminal activity. In exchange for defendant’s plea of “true,” the court should revoke defendant’s supervised release and impose 6 months imprisonment, with no term of supervised release thereafter. Further, the government agreed to decline to proceed with remaining alleged violations of supervised release conditions.

At the revocation hearing, defendant pleaded “true” to the allegation that defendant associated with persons engaged in criminal activity.

V. Principles of Analysis

Upon finding by a preponderance of the evidence that a defendant has violated conditions of supervised release, pursuant to 18 U.S.C. § 3583(e)(3) the court may revoke the term of supervised release and require defendant to serve in prison all or part of the term of supervised release without credit for time served on post-release supervision. The original offense of conviction was a Class B felony; therefore, the maximum term of imprisonment authorized under 18 U.S.C. § 3583(e)(3) is 3 years.

According to U.S.S.G. § 7B1.1(a), if the court finds by a preponderance of the evidence that defendant violated a standard condition of supervised release by associating with persons engaged in criminal activity, defendant will be guilty of committing a Grade C violation. U.S.S.G. § 7B1.3(a)(2) indicates upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision. U.S.S.G. § 7B1.4(a) provides that in defendant’s

case a revocation of supervised release based on a Grade C violation and a criminal history category of IV, the guideline imprisonment range is 6 to 12 months.

18 U.S.C. §§ 3583(e) and 3553(a) provide that in determining sentence, the court shall consider:

1. The nature and circumstance of the offense and the history and characteristics of the defendant; see 18 U.S.C. § 3553(a)(1);
2. The need for the sentence imposed to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, other corrective treatment in the most effective manner; see 18 U.S.C. §§ 3553 (a)(2)(B)-(D);
3. Applicable guidelines and policy statement issued by the Sentencing Commission, for the appropriate application of the provisions when modifying or revoking supervised release pursuant to 28 U.S.C. § 994(a)(3), that are in effect on the date the defendant is sentenced; see 18 U.S.C. 3553(a)(4); see also 28 U.S.C. § 924(A)(3);
4. Any pertinent policy statement issued by the Sentencing Commission, pursuant to 28 U.S.C. § 994(a)(2), that is in effect on the date the defendant is sentenced; see 18 U.S.C. § 3553(a)(5); and
5. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; see 18 U.S.C. § 3553(A)(6).

VI. Application

The undersigned has carefully considered each of the five factors listed in 18 U.S.C. §§ 3583(e) and 3553(a).

Findings:

Defendant pleaded “true” to the allegation that he violated a standard condition of supervised release by associating with persons engaged in criminal activity. Based upon defendant’s plea of “true” to the allegation and U.S.S.G. § 7B1.1(a), defendant violated conditions of supervised release in the manner alleged in the petition. Defendant’s violation is a Grade C violation with policy guidelines suggesting 6 to 12 months imprisonment upon revocation.

Conclusion and Justification:

Defendant has demonstrated inability to adhere to conditions of supervision. Defendant did not comply with conditions of his supervision by failing to refrain from associating with persons engaged in criminal activity. As such, incarceration appropriately addresses defendant’s violation.

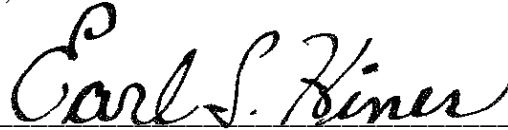
RECOMMENDATIONS

1. The court should find that defendant violated a standard condition of supervised release, by failing to refrain from associating with persons engaged in criminal activity, in the manner alleged in the petition.
2. The petition should be granted and defendant’s supervised release revoked pursuant to 18 U.S.C. § 3565.
3. Defendant should be sentenced to a term of imprisonment of six (6) months.
4. Upon release of imprisonment, defendant should not be placed on supervised release.

OBJECTIONS

At the close of the revocation hearing, defendant, defense counsel, and counsel for the government each signed a standard form waiving their right to object to the proposed findings and recommendations contained in this report, consenting to revocation of supervised release as recommended herein, and consenting to the imposition of the above sentence recommended in this report. Defendant waived his right to be present and speak before the district judge imposes the recommended sentence. Therefore, the court may act on the report and recommendation immediately.

SIGNED this 5 day of November, 2008.

A handwritten signature in cursive script, reading "Earl S. Hines", written over a horizontal line.

Earl S. Hines
United States Magistrate Judge